Sovereign marks

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Sovereign Marks

Tanja Aalberts

Introduction

This chapter analyses a treaty made on behalf of the *Association Internationale du Congo* (the infamous private company of King Leopold II of Belgium) with Roi Né-Do'ucoula, (one of) the King(s) of Boma on 19 April 1884. Despite the popular imaginary of the continent as *terra nullius*—no man's land—treaty making with African Chiefs was an important legal instrument to regulate the Scramble for Africa in the nineteenth century. Whereas legal analysis would usually focus on the content of the treaty and its provisions to establish legal facts, this chapter moves the attention to the signatures at the bottom. I will argue that they constitute an important object of international law, as they provide a counter-narrative to the popular standard of civilization as the founding doctrine of the Family of Nations in the nineteenth century.

While often neglected, signatures constitute a crucial part of the practice of international law—for one thing, without a signature the piece of paper is a text, a fairy tale, a desire or ambition, but not a treaty with legal consequences. Or more precisely: without signature*s* (in the plural), because as a source of international law a treaty consists of an agreement between two or more actors (primarily states) on the international scene. Apart from validating the text as a legal document with binding obligations for the parties involved, the signatures thus also say something about the legal status of the signatories: not everyone is able or authorized to enter into a treaty. The question of international legal personality (who counts as an actor under international law, and has legal capacity) thus is a matter of identifying who is included—as well as who is excluded—from the Family of Nations; in other words, it concerns the boundaries of international society. This question was a notoriously pertinent one in late nineteenth-century legal doctrine, because of an exclusionary vision of the Family of Nations, consisting only of civilized—European Christian—states.

This chapter analyses what the signature of roi Né-Do'ucoula (and similar signatures on numerous treaties of cession) as an object of international law tells us about the modern international legal order as it emerged in the late nineteenth century. While colonial treaties have been criticized as rhetorical window-dressing and imperialist violence, from a performative perspective something more interesting is at

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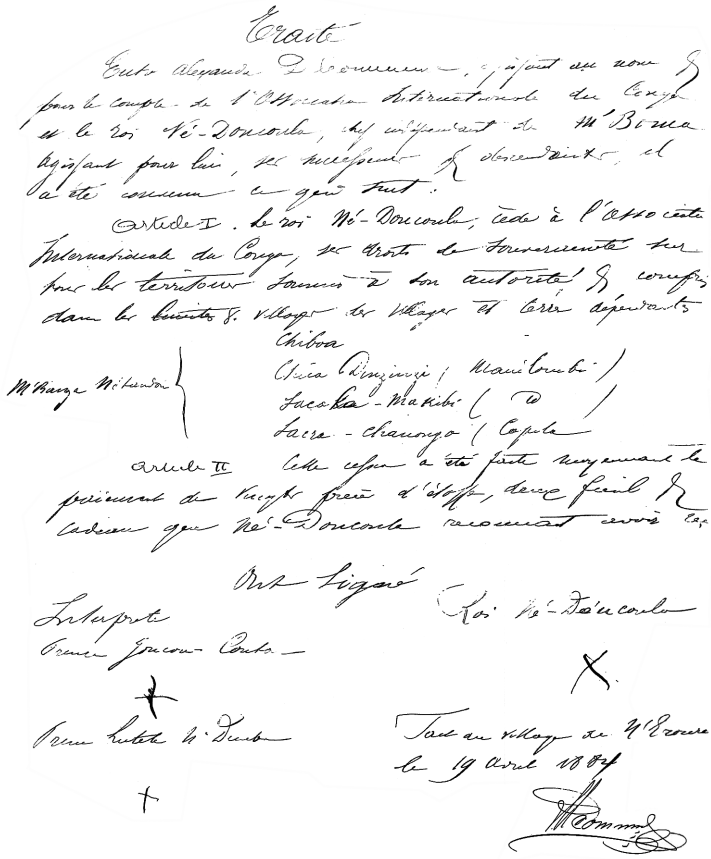

Fig 33.1 Copy of the treaty (Traité) between Alexandre Delcommune (representing l'Association Internationale du Congo) and King Né-Do'ucoula, 19 April 1884. The original is available in the archives of the Belgian Ministry of Foreign Affairs, Brussels: File A1/1377, document 1/2/a

play. Such a perspective looks at law as not merely a body of rules, but as a productive practice, which creates the subjects it seeks to regulate (or exclude).[1] As single documents, these treaties are particularly interesting in terms of the hybrid processes of subjectification that they enact. By zooming in on the signatures, this chapter discusses how they at once apparently illustrate the standard of civilization *and*

[1] Judith Butler, *Bodies that Matter. On the Discursive Limits of 'Sex'* (Routledge 1993); François Ewald, 'Norms, Discipline, and the Law' (1990) 30 Representations 138.

undermine its performance as the fundament for the Family of Nations. In other words, as objects of international law the signatures—or rather marks or crosses—embody at the same time the condition of possibility of the nineteenth-century international legal order, *and* undermine its defining framework and thus constitute its condition of impossibility.

Colonialism as a Legal Enterprise

The popular discourse of the Scramble for Africa in the late nineteenth century is based on the image of Africa as *terra nullius,* as no man's land, visualized also by numerous maps with vast white spaces that—somewhat ironically—represent the 'dark continent' or the 'heart of darkness', as two contemporary authors describe it (Henry Morton Stanley and Joseph Conrad respectively, though the second with a metaphorical and critical twist that the explorer misses).[2] Exploration, map-making, and legal ordering went hand in hand, quite literally as in many cases explorers, including famous pioneers like Stanley and Pierre Savorgnan de Brazza, did all at once. These explorers had a crucial political and legal role in the colonial enterprise. As employees of colonial governments they were all-rounders who combined their travels and map-making practices with drafting treaties of trade, protection, and cession with African chiefs. The most well-known example is indeed Stanley, who claims to have concluded more than 400 treaties in the service of King Leopold II of Belgium and the *Association Internationale du Congo* as his private enterprise.

An important background condition for understanding how colonialism operated as a legal enterprise, is the emergence of positivism as the leading legal doctrine and foundation for the international legal order in the nineteenth century. Legal positivism recognizes law as a man-made institution, grounded in rules formulated and agreed upon by sovereign states, as the key subjects of international law, to regulate their interactions. Given their foundation in state consent, treaties count as one of the most important sources of international law in positivist jurisprudence.[3] Treaties in turn, treaties are indicators of the legal capacity of their signatories, and treaty making can hence involve an act of 'implied recognition' of an entity's status as a subject and legal person under international law.[4] Crucially, in the late nineteenth century the concept of international legal

[2] Henry M Stanley, *The Congo and the Founding of its Free State: A Story of Work and Exploration* (Sampson Low, Marston, Searle & Rivington 1885); Joseph Conrad, *Heart of Darkness and The Secret Sharer* (Blackwood's 1902).

[3] Malcolm N Shaw, *International Law* (7th ed, CUP 2014).

[4] According to modern legal doctrine, only comprehensive bilateral treaties could imply a 'proper mode of recognition [of a state] in all cases in which there is no reasonable doubt as to the intention of the parties' (Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 378). Informal bilateral relations or for instance accession to multilateral treaties do not qualify. Whereas the current treaty can hardly be called comprehensive, what I am interested in here is not the specific recognition of a particular entity as a state, but the more general practice that validating a piece of paper with a signature implies that the signatories have the legal capacity to do so; otherwise the paper cannot become a treaty and function as legal title in the Scramble for Africa.

personality was based on an absolute distinction between civilized and uncivilized nations—the infamous standard of civilization—as another component and mechanism of contemporary legal positivism. The boundaries of international society were drawn between European states as the Family of Nations on the one hand, and barbarian nations and savage entities, on the other. In particular the latter group—which included notably the peoples of the African continent—lacked any status, rights, and duties within the international legal order. However, this exclusion of savage entities on the basis of the standard of civilization is hard to reconcile with treaty-making practices as an important trope in the European race to show better legal titles to colonial territory.[5] The colonial signatures embody this dual practice of in/exclusion, as will be elaborated later. As such, they rendered the boundaries of (the exclusive) international society instable and disrupted the international legal order that they at the same time legitimized.[6]

The Scramble for Congo by Treaty

So what do these treaties look like? There are different types. While some colonial governments allegedly worked with standard forms, produced in the homeland of the colonial power,[7] other treaties seem to have been produced on the spot, with different, more individual, formulations, even if there are also striking similarities in terms across various treaties.[8] Most treaties are in the mother language of the colonial power, and include a reference to (and signatures of) present interpreters.[9] Some treaties are rather formalized, on official paper with a letterhead, a long list of articles and in careful handwriting; others have clearly been produced in haste and look more informal.[10] The treaty under scrutiny here is a clear example of the latter. As mentioned, it is a treaty made on behalf of the *Association Internationale du Congo (AIC)*. The Association was a society founded on 17 November 1879 by King

[5] See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2001) Ch 2.

[6] Instability in this context should not be read in an immediate sense, but 'in a historical trajectory wherein the very existence of the "other" on the terrain of the international functions as both a constraining and an enabling force' (Vivienne Jabri, 'Disarming norms: postcolonial agency and the constitution of the international' (2014) 6 International Theory 372, 384).

[7] Henk L Wesseling, *Verdeel en Heers. De Deling van Afrika 1880-1914* (Aula 2003). While there are few if any examples of such forms left in the archives, there is a document with confidential instructions to Stanley for draft formulations for (i) a political treaty; and (ii) a treaty for territorial cession (in English and French), dated 1 November 1882 (file SA.4777, available in the archives of the Afrikamuseum, Tervuren, Belgium). The treaty with the King of Boma resembles the second template.

[8] For a classic and comprehensive study of these practices and comparison of different colonial powers, see Charles Henry Alexandrowicz, *The European-African Confrontation. A Study in Treaty Making* (AW Sijthoff 1973).

[9] Exceptions are treaties with Arabic speaking rulers, for which there seems to have been a practice of drafting two versions—in European and in Arabic.

[10] Based on an investigation of the (incomplete) archive with treaties relating to the Congo Free State and Association Internationale du Congo (file A1/1377) at the Belgian Ministry of Foreign Affairs, Brussels.

Leopold II of Belgium to further his private interests in obtaining colonial territory for commercial and political gains.[11] For this purpose, Leopold employed Stanley and an army of officers to explore the river Congo, settle stations at its shores, and sign treaties with local chiefs to establish a trading monopoly and obtain territory and sovereign power.

The treaty is written on a standard sheet of paper, identified as '*Traité*' in handwriting at the top, in quick script or scribbles, with four signatures at the bottom: of Alexandre Delcommune (representative of the AIC), of King Né-Do'ucoula, and of two interpreters. The treaty consists of only two articles: the first stating that 'roi' Né-Doucoula (whose name is spelled differently at various instances), 'chef indépendent' of Boma, 'cède à l'Association Internationale du Congo ses droits de souverainité sur tous les territoires soumis à son autorité … '.[12] The second article states that he has received twenty pieces of fabric in return. As such the treaty is exemplary of Leopold's instructions to Stanley at the time: 'The treaties must be as brief as possible … and in a couple of articles must grant us everything'.[13] This particular treaty is one of series of nine treaties, held together by a piece of rope, each identical in terms of their text and provisions, drafted on the same day, but concerning different territories, and signed by different kings (who are all identified as 'roi de Boma').

But what interests me here is not so much the specific content of the legal provisions, but the practice of treaty making as such, and notably the performative significance of the signatures or marks. Overall, this treaty seems a perfect illustration of what Otto von Bismarck pedantically dismissed as the easy practice 'ein Stück Papier mit Negerkreuzen darunter zu bekommen'[14] in Africa. Still, it is not just a piece of paper recording random text. Despite its informal looks, it clearly was designed to be something other than a diary note, a memo, or a novella. While there are no specific legal requirements of form for the creation of international treaties, according to common practice legal contracts contain specific elements that we can recognize here too: the treaty is written text, with 'articles' containing the elements of the agreement, there is reference to interpreters, the identification of place and date, and last but not least the signatures of the parties involved (as either right- and duty-holders, or as witness to the treaty). In addition to their appearances or guises as legal agreements, in diplomatic practice the treaties were respected as legally valid amongst the colonial powers themselves, as has been confirmed retrospectively in the International Court of Justice's *Western Sahara case* (1975).[15]

[11] It was one of four creations by King Leopold II, and successor to the *Association Internationale Africaine* (1876), the *Comité d'Études du Haut-Congo* (1978), and later transformed into the Congo Free State, claimed by Leopold in his personal capacity (1885). Remarkably, the Association was recognized as sovereign power by, *inter alia*, the United States and Germany.

[12] 'The independent chef of Boma cedes to the International Association of Congo his rights of sovereignty over all the territory under his authority' (translation by the author).

[13] Quoted in Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism* (Holton Mifflin Company 1999) 71.

[14] 'To obtain a piece of paper with a Negro cross underneath' (translation by the author). Quoted in Wesseling (n 7) 162.

[15] *Western Sahara case* (Advisory Opinion) [1975] ICJ Rep 80.

At the same time, critics have rightly problematized the conditions under which the treaties were drafted. Can we assume 'free consent'? Did the chiefs have any understanding of what they were doing by putting the(ir) cross on this piece of paper? Did they have a conception of the 'treaty' as a legal instrument which entails mutual obligations to signatory parties? Can you cede or transfer sovereignty, if this is a purely European concept, of which the native could not have had a conception?[16] Interestingly, these arguments are put forward by postcolonial critics as well as contemporary lawyers supportive of the colonial enterprise, such as John Westlake, a key publicist on the colonial issue at the prominent *Institute de Droit International*. Whereas the former criticize the treaties as a matter of window dressing, organized hypocrisy, and mere expediency to pursue imperialist projects (ie based on the unequal content and conditions of its drafting),[17] Westlake seems to have trouble with the treaty-making practices precisely because of the performative aspects of the signatures, as will be elaborated later.

The criticism of the colonial treaties as a form of organized hypocrisy is supported by the fact that the imperial legal repertoire was directed at regulating the intra-European rivalries, rather than concerned with legitimating the colonial endeavours vis a vis its direct objects. For instance, the treaties played an important role as currency at the 1885 Berlin conference on the European trade and civilising mission in Africa, to which the Indigenous rulers themselves were not invited.[18] In other words, these legal practices served first and foremost a political function amongst European powers, rather than a legal function between colonizers and colonized. However, in my view this distinction between endogenous and exogenous functions[19] might suggest too strong a separation of the inside of the Family of Nations, from its uncivilized outside. The signatures indeed suggest that such a perspective neglects the legal performativity of treaty-making practices, the relationality they imply between colonizer and colonized as parties to a treaty, as well as the inherent tension in the modern legal order that these practices produce. So let's now zoom in on the signatures.

'Negerkreuzen' as Sovereign Marks

Comparing the four signatures on the treaty, at first glance we seem to have a perfect visualization of the standard of civilization: the powerful, flamboyant signature of

[16] Interestingly, treaty making was often accompanied by a ritual of establishing blood brotherhood (*pacte de sang*). Indeed, in his travel diaries on his work for Leopold, Stanley (n 2) more frequently mentions the ceremonies for blood brotherhood than the 400 or so treaties that he allegedly drafted. Several authors conclude from these solemnities that the African chiefs were in any case aware of the binding nature of the treaties. See Alexandrowicz (n 8) 51–3, who quotes the explorers Sir Frederick Lugard and Dr Karl Peters in this regard.

[17] Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (U Minnesota Press 1996).

[18] Stephen Humphreys, 'Laboratories of Statehood: Legal Intervention in Colonial Africa and Today' (2012) 75 Modern Law Review 475.

[19] Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 Leiden Journal of International Law 621.

Delcommune stands in stark contrast with the signatures of King Né-Do'ucoula and the local interpreters. One can imagine the latter persons holding a pen for the first time. Interestingly, in some copies of other treaties reference is made to 'their signature or mark' behind the fully spelled names of the African signatories. Yet, it is this very mark that seems to lie behind Westlake's unease with the treaties. While the treaties provided a proper legal title to the colonial enterprise, in line with the legal positivist doctrine, they also implied a status of the chiefs that—according to the same doctrine—these savage rulers could not have. The very 'cross' by which they at once officially ceded their sovereignty to the colonial powers also implied they had the legal status as sovereigns to do so. After all, the right to enter into international treaties—including ones that restrict sovereign power—is an attribute of state sovereignty.[20] Indeed, 'the natives' right to dispose freely of themselves' was an important element of the repertoire of juridical technologies of colonial rule.[21] Whereas this seems to make natives complicit to their own transformation into objects of colonization, from a performative perspective something else is going on at the same time. For, as previously mentioned, in the positivist scheme, treaty making implies recognition of an entity's status under international law. The ambiguity is nicely captured by Oppenheim in his observation that

> [C]ession of territory made to a member of the family of nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family. . . . No other explanation of these and similar facts [such as that these non-sovereign entities engaged in sovereign behaviour] can be given except that these [non-European] not-full Sovereign States are in some way or another International Persons and subjects of International Law.[22]

It is not the aim here to provide a full historical record of colonial treaty making as such, or a legal analysis of the treaty as a repository of legal facts (focusing on the content of the treaty provisions). Instead the final section will analyse the colonial signatures as objects of international law from a performative perspective. Jacques Derrida's discussion of the performativity of the sign provides us with interesting pointers for conceptualizing and theorizing Indigenous presence and agency (circumscribed as that obviously was) in relation to the international legal order.

Performative Objects

From a performative perspective, we can analyse the signature as a legal technology, which not only produces the signatory as a sovereign subject and legal

[20] As later confirmed in the *SS Wimbledon case*, PCIJ Series A [1923] No 1, 25.

[21] As stated by the American representative to the Berlin Conference, Mr Kasson. His statement was included in a separate declaration, in an appendix to the Protocol of the Final Act of the Berlin Conference, as his statement was not endorsed by the other signatory parties (Alexandrowicz (n 8) 47).

[22] Lassa Oppenheim, *International Law: A Treatise. Volume I* (Longmans, Green and Co 1912) 86.

person—'invents the signer' in Derridian terms—but in the case of colonial treaties also marks the aporia, as a self-engendered paradox, of the Family of Nations as the European, civilized core of a natural and fully constituted legal order. This we can further unpack by drawing upon Derrida's reflections on the signature as an iteration mark, that renders the subject present and absent at the same time.

As a written sign, a signature is a 'mark that subsists, one which does not exhaust itself in the moment of its inscription and which can give rise to an iteration in the absence and beyond the presence of the empirically determined subject who, in a given context, has emitted or produced it'.[23] The text or document as such carries its own force and erases the subject it has produced. In a sense, this is the very function of the signature, to create a border between the will of its maker and the document that is made and the legal fact that is created. Yet, the question is if the signature can succeed in its performance or signification in this way, or instead carries the seeds of its own failure.[24]

The erasure of non-European subjectivity, and the presentation of the signatories as objects without agency, is a familiar postcolonial critique of the treaty-making practices: colonial treaties (whether of protection, consular jurisdiction, and extraterritoriality, or cession) 'took the form of agreements between [equal] sovereign States, the substance of which however was to deny any such pretension'.[25] The emphasis in these critiques is on the exclusionary and unequal practices of modern international law. But at the same time, the content (and the ridicule implied in exchanging sovereignty rights indefinitely for twenty pieces of cloth) cannot completely obliterate the form, in particular given the importance and role of treaty making as a foundational practice of legal positivism. In the case of the colonial treaties, it is the relationality between the extravagant signature of the colonizer and the crosses of the Indigenous chiefs that testifies to its failure, the aporia of the contemporary legal order insofar as it undermines or dismantles its own structure.

The ambiguous legal status of the 'natives' as 'savages' as on the one hand excluded from the contemporary Family of Nations, yet at the same time signatories to international treaties (as a key source and foundational practice of the modern international legal order) was problematic for the positivist projection of a coherent and unitary system. But a Derridian reading reveals an even more fundamental problem that the crosses constitute for the legal order. They mark the embodied presence of the colonial subject, who remains visible through its signature: the signature captures and marks a 'having-been present in a past now' which becomes a 'now in general' (maintenance, 'the transcendental form of

[23] Jacques Derrida, 'Signature Event Context' in Jacques Derrida (ed), *Limited Inc* (Northwestern UP 1988) 9.

[24] Connal Parsley, 'Seasons in the Abyss: Reading the Void in Cubillo' in Anne Orford (ed), *International Law and its Others* (CUP 2006) 107, 113.

[25] Matthew Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans (ed), *International Law* (3rd ed, OUP 2010) 213.

presentness').[26] So even though the content of many of the treaties *de jure* erased both status and rights of the Indigenous rulers, and reduced them to objects of colonization, there is the ghost of the Indigenous signatory that authorized this title to territory, which not only undermines the very logic of the standard of civilization as a marker of legality, but also the positivist self-image of the European core as a unitary and complete order by and of itself. The reality of this ghost transpires also from the legal discussion during the process of decolonization, on whether the sovereign statehood of the postcolonies concerned an 'originary' or 'derivative title' (in other words, did they obtain sovereignty for the first time, or was decolonization a return to their original condition as sovereigns before they were colonized?).[27]

For the civilized core itself, sovereign statehood was presented as the natural condition of European entities, the origins of which are 'beyond history and inquiry'.[28] However, as Anghie has argued persuasively, it is in the colonial encounter that the Europeans are produced as the original sovereign powers who command and impose their universal law vis a vis the uncivilized, who in turn fall within the orbit of international law and are recognized as partially or proto-sovereign for the purpose of their own subjugation, yet are produced as outlaws who need to be disciplined and civilized via sanctions and coercions at the same time: 'The primitive was not so much outside international law awaiting its ordering ministrations, but within the very heart of the discipline, and the subsequent efforts of the international jurist to define and manage the primitive served to conceal this fundamental connection.'[29] Anghie then highlights the erasure of non-European identities: '[T]he methodology used by positivists to examine these treaties had the paradoxical effect of erasing the non-European side of the treaty even when claiming to identify and give effect to the intentions of that party'.[30]

The fact that there was no unified position amongst contemporary lawyers and legal publicists, and—crucially—that their discussions do not focus on the content of the treaties and their legal provisions, but on the treaty-making practices as such, shows the fundamental nature of the controversy. It is not just about the status of the Indigenous chiefs and the boundaries of international society, but about the foundation of the contemporary legal order based on the positivist paradigm, and the Family of Nations itself. The treaty-making practices were both a condition of possibility of modern international law, yet at the same time—in the case of colonial treaties—its condition of impossibility, and a potential rupture for the positivist self-image and European legal order based on the standard of civilization.

[26] Derrida (n 23) 20. At the same time, Derrida questions this illusion of the signature as an absolute originary event, which is based on the assumption of a singular intentional present that is captured within the mark itself: '[T]he condition of possibility of [the] effects [of signature] is simultaneously . . . the condition of their impossibility, of the impossibility of their rigorous purity.' (ibid).

[27] Charles H Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty' (1969) 45 International Affairs 465. This was not only an academic discussion, as illustrated by the *Western Sahara case* judgment (n 15).

[28] Anghie (n 5) 102. [29] ibid 65. [30] ibid 71.

The embodied presence of colonial subjects through their signatory marks destabilizes the European international order as 'always already' present and complete, and reveals the role of colonial subjects as not just its constitutive outside, but inside. As such the signatures can be identified as objects of international law, that at once produced the boundaries of (the exclusive European) international society and rendered them instable through its disruptive potential of the positivist projection of that very order.